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No. 95-1351

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BLYTHEVILLE SCHOOL DISTRICT NO. 5, *et al.*,
Petitioners,

v.

SHIRLEY HARVELL, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals correctly interpreted Section 2 of the Voting Rights Act, consistent with the well-settled principles announced by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by other federal circuits in numerous cases, in holding that minority candidates who received "overwhelming support" from minority voters were the candidates of choice of minority citizens, notwithstanding a decline in the number of votes cast for minority candidates after adoption of a majority vote, runoff requirement to replace the previous plurality system?

II.

Whether the Court of Appeals correctly interpreted Section 2 of the Voting Rights Act in holding that roughly proportional representation by minority candidates under the prior plurality system did not defeat respondents' challenge to the *current* majority vote electoral structure under which, in eight different elections, the only minority candidate seated on the School Board was an incumbent running without opposition?

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Respondents, Shirley Harvell, et al., respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari, filed on February 22, 1996. The Clerk of the Court extended the time for filing the Brief in Opposition to May 6, 1996.

STATEMENT

Minority voters and candidates brought this action in 1989 under Section 2 of the Voting Rights Act, challenging the structure for electing representatives to the Blytheville, Arkansas School Board. The eight Blytheville School Board members are chosen in at-large elections, with numbered posts,[1] staggered terms and, since 1987, a majority vote requirement.[2] According to the 1980 census,[3] the population of the School District was 64 percent white and 35 percent black, while the voting age population was 70 percent white and 29 percent black.

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[1]Two members are elected each year to numbered posts with four-year terms.

[2]Until 1987, elections were by plurality vote. In 1987, however, the Arkansas legislature enacted legislation requiring that all school board members be elected by majority vote. *See* Ark. Code Ann. § 6-14-121.

[3]The 1990 census, which was not available at the time of trial, reported the School District's population as 62 percent white and 37 percent black. App. 3 n.1.

In its initial decision in 1991, the district court found that "the black population in the School District is geographically compact and located on the south side of the City of Blytheville." App. 89. The district court also found that "voting in the School District is racially polarized," App. 91, and that "[t]he black population in the School District is a politically cohesive group," App. 89. The court found that, as of the date of decision, there had been two black members on the Board continuously since 1975, and that such sustained electoral success was inconsistent with a Section 2 violation. App. 95-96. The district court thus dismissed the Complaint. App. 97.

On the first appeal, the Court of Appeals reversed and remanded for further findings. The Court noted that, since the change to a majority vote, runoff requirement, the only successful black candidate had been an incumbent running unopposed. App. 84. The Court indicated: "We agree with plaintiffs that successes prior to the 1988 majority vote requirement do not necessarily reflect the black voters' present ability to elect representatives of their choice under the current election scheme." *Id*.

On remand, the district court entered supplemental findings of fact. The court reiterated its earlier finding that voting in the Blytheville School District is racially polarized, and found that the majority vote requirement adopted in 1987 "may enhance the opportunity for discrimination against African-American voters." App. 67. Looking at elections since 1988, the

court found that the only successful black candidate had been an incumbent who ran unopposed. The court concluded that "the School Board no longer proportionally represents the racial makeup of this district," App. 72, and that "the successes enjoyed by black candidates since 1988 fall within the 'special circumstances' articulated in *Thornburg v. Gingles*, 478 U.S. 30, 57 n.25 (1986)," App. 70.[4]

The district court set out election results showing that between 1988 and 1992, eight African-American, non-incumbents had sought election to the School Board and all had lost. App. 68-71. In 1991, the year the second African-American Board member retired, two African-American candidates ran and lost. *Id.* Yet, the court found, solely on the basis of a drop in total votes cast for African-American candidates after the majority vote requirement was enacted, that "none of the black candidates since 1988 ha[s] been the 'preferred' candidate of the black community." App. 71. The court stated its belief that black voters chose "not to vote rather than cast their vote for a candidate of the other race." App. 72. The court acknowledged that "other explanations could exists for the drop in support for black candidates," but

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[4]*Gingles* indicates: "[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." 478 U.S. at 57.

held that the plaintiffs had failed to establish that the white majority votes in such a manner as usually to defeat the preferred candidate of minority voters. *Id.*

On the second appeal, the Court of Appeals for the Eighth Circuit, sitting *en banc*, reversed the district court. Reviewing the district court's application of the analysis set out by this Court in *Thornburg* v. *Gingles* and other cases, the *en banc* Court found no dispute as to the first two of *Gingles*' three preconditions. *See* 478 U.S. at 50-51. "The district court found that Harvell established the first two *Gingles* preconditions. The school district does not contest these findings of geographic compactness and political cohesiveness. We therefore accept them as established." App. 5.

With regard to the third factor -- that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate -- the Court of Appeals first noted that the district court's finding of racially polarized voting in School Board elections was "undisputed," supported by the record and "weighs heavily in favor of finding the third *Gingles* precondition established." App. 5. The Court summarized the results of plaintiffs' regression analysis which "strongly supports the conclusion that those black candidates who [ran] in elections from 1988-1992 were in fact the minority-preferred candidates." App. 6-7. The Court noted that "the school district does not contest this statistical evidence and offers no other evidence to contradict the statistical preference." App. 7. As to the district court's

critical conclusion that the unsuccessful African-American candidates since 1988 were not the candidates of choice of black voters, the Court held that speculation about the causes of low voter turnout is an insufficient evidentiary basis on which to reject the strong showing of support among African Americans who did vote. App. 7.

The Court of Appeals next considered whether "the historical fact of proportional or near proportional representation on the school board" precluded a finding of a Section 2 violation. App. 11. The Court rejected the School District's reliance on historical proportional representation for two reasons. First, proportional representation was achieved prior to enactment of the majority vote requirement and "[n]o black candidate has won a contested election since the change in the law." App. 12. The Court noted that if the majority vote requirement had been in place prior to 1988, proportional representation never would have been achieved. App. 12-13. Second, even prior to 1988, "most of the elections won by black candidates were done so as incumbents in the face of no opposition. This is precisely the type of special circumstance recognized in *Gingles*." App. 13.

Reviewing the district court's "totality of the circumstances" analysis in light of these legal errors, the Court of Appeals reiterated that voting is "highly polarized" in school board elections and noted that "[t]here has been only minimal success under the present scheme, with Dr. Nunn's unopposed reseating as an incumbent in 1990 representing the only minority victory in nine attempts," App. 15. Regarding other factors

which *Gingles* indicates are "supportive of, but not essential to" a Section 2 claim, 478 U.S. at 48 n.15, the Court of Appeals found: 1) that the district court gave insufficient weight to the vestiges of a conceded "long history of racial discrimination in the electoral process in Arkansas," which impaired the ability of some African Americans in Blytheville to participate in the electoral process; and, 2) that the majority vote requirement adopted in 1987 enhanced the opportunities for discrimination against African-American voters. App. 16. The Court concluded that, under the totality of the circumstances, plaintiffs had demonstrated that the School Board election scheme diluted minority voting strength and thus had established a violation of Section 2. The Court remanded for "entry of an appropriate remedial decree," cautioning the district court "to steer clear of the type of racial gerrymandering proscribed in *Miller*,[5] while keeping in mind the need to vindicate the

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[5]*Miller v. Johnson*, 115 S. Ct. 2475 (1995). The district court's finding that African-American voters in the Blytheville School District are "geographically compact" suggests that constructing a remedy plan that comports with *Miller* will not be difficult in this case.

Although the dissenting opinion implied, App. 30 n.3, that a single-member districting remedy was unnecessary, and that the majority's reference to such a remedy was therefore also unnecessary, in fact the Arkansas Legislature has *required* such a remedy in school districts with minority population of 10 percent or more, unless the district has been found not to be in violation

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rights of minority voters," App. 18.

Five judges dissented, stating their view that the Court did not sufficiently account for white crossover voting in its analysis of racial bloc voting, that low black turnout meant that the post-1987 candidates supported by black voters were not really the candidates of choice of the black community, and that the pre-1987 success of black candidates and the election of the an unopposed black incumbent in 1990 established that the electoral scheme did not violate Section 2. App. 18-31.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly stated and applied well-settled law to facts found by the district court and established by undisputed evidence in the record. There is no conflict in the circuits on any issue raised by the Petition. The Question Presented identifies no error of law made by the Court of Appeals, but simply asks this Court to determine whether the district court's conclusions were "clearly erroneous." The basis for the ruling below was, however, legal error. The bulk of petitioners' argument amounts to nothing more than a fact-specific disagreement with the Court of Appeals'

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[5](...continued)
of the Voting Rights Act. Ark. Code Ann. § 6-13-631. *See* App. 16 n.10. The enactment of this provision also indicates that any policy in support of at-large school board elections in Arkansas is weak.

application of black letter law to the uncontested facts of this case. The Petition presents no substantial question that warrants review by this Court.

I. The Court of Appeals Correctly Applied Settled Law Concerning the Definition of the Candidate of Choice of Minority Voters

The Petition raises no issue of law regarding the definition of the candidate of choice of minority voters, as used in the third *Gingles* precondition. *See* 478 U.S. at 51. The record establishes that since enactment of the majority vote requirement, six different African-American candidates, running in a total of eight contested elections, received overwhelming support from African-American voters. App. 7, 9. The district court's sole reason for failing to find that any of these candidates was a candidate of choice of African Americans was the drop in votes cast for African-American candidates in these elections, compared to pre-1988 contests.

The Eighth Circuit carefully rejected any "categorical" conclusion that "a candidate is the minority-preferred candidate simply because that candidate is a member of the minority." App. 6. The Court instead followed the other circuits in holding: "The preferences of the minority voters must be established on an election-specific basis, viewing all the relevant circumstances." *Id.* (citing *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994)).

Petitioners argue that the Court should grant review because the decline in African-American turnout after enactment of the majority vote, runoff law "provides substantial evidence of the African-American community's dissatisfaction with these candidates." Petition at 22. Yet, as found by the Court of Appeals, there is no record evidence as to the cause of the decline in votes cast in favor of African-American candidates. Nothing suggests that a decrease in voter participation reflected dissatisfaction with these six candidates.

The federal Courts of Appeals consistently have concluded that the candidates of choice of minority voters are ordinarily determined on the basis of actual voting patterns in elections. The Sixth Circuit summarized: "courts generally have understood blacks' preferred candidates simply to be those candidates who receive the greatest support from black voters." *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n.1 (1994), *cert. denied*, 115 S. Ct. 1960 (1995). This Court in *Gingles* described "the essence of a § 2 claim" as "an inequality in the opportunities enjoyed by black and white *voters* to elect their preferred representatives." 478 U.S. at 47.[6] *See also Jenkins v. Red Clay*, 4 F.3d at 1126; *Collins v. City of Norfolk*, 883 F.2d 1232, 1238 (4th Cir. 1989) (minority candidate of choice is the "candidate who received the most black votes"), *cert. denied*, 498 U.S. 938 (1990).

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[6]*See also id.* at 48 (referring to impediment to "ability of minority *voters* to elect representatives of their choice"), 56 ("black *voters*' ability")(emphasis added).

The Court of Appeals for the First Circuit has noted that "[t]he cause of poor turnout is often difficult to detect." *Uno v. City of Holyoke*, 72 F.3d 973, 987 (1st Cir. 1995). Where low voter turnout results from the effects of past discrimination, depressed turnout may itself be probative of dilution. *Id.* at 986-987. The Court in the *Uno* case left open the possibility that "especially low turnout in a particular election may be evidence that factors other than racially based politics (say, poor political organization or lack of minority community support) were the cause of the minority community's inability to elect its preferred candidate in that election," *id.* at 987 n.7. Similarly, the Eighth Circuit in this case recognized: "There may be situations in which voter apathy may be linked to disapproval of a particular candidate, but there is no indication that such is the case here." App. 7. The *en banc* Court reasoned:

> The silence of the minority voters is not so deafening as to warrant a finding that they disapproved of six different minority candidates in light of the uncontroverted statistical evidence that supports a finding of overwhelming support from those blacks who did vote. Nor are the numbers so low as to reduce their statistical significance to a nullity...
>
> ... Under the school district's proferred view, the black voters of Blytheville have gone five consecutive years, six candidates, and eight campaigns without stating a preference, a proposition we cannot accept.

App. 7, 9.[7]

As noted by the *Uno* Court, "even with a modest turnout, the actual votes cast may be probative if a sufficiently strong pattern emerges," 72 F.3d at 986. The Eighth Circuit properly concluded that mere speculation about the causes of low turnout is not sufficient to overcome a strong pattern of preference by those minority voters who actually vote.[8] *Accord Gomez v.*

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[7]The Court of Appeals correctly rejected the School District's effort to characterize two of the six unsuccessful African-American candidates as militants who disenfranchised themselves from the African-American community. "There is no evidence in the record that the minority community viewed any of the six different candidates as in any way inadequate representatives of its interests." App. 11. The Petition blatantly takes testimony out of context in rearguing this point. *See* Petition 23 n.19. For example, Mrs. Harvell's testimony that she "was thought of as a troublemaker" related to "*white* clerks at the *polling place*" who tried to intimidate a black voter. See TR 177-78. Petitioners fail to mention that the reason parents considered Mrs. Harvell ineffective, *see* Petition at 23 n.19, was because of the School Board's unresponsiveness to the black community's concerns. TR 164-65. Nothing in the record indicates that anyone in the *minority* community had negative views of any of the six unsuccessful African-American candidates.

[8]Petitioners argue that the Eighth Circuit's rule would mean that if only one African American votes in an

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City of Watsonville, 863 F.2d 1407, 1415-16 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989)(in analyzing political cohesiveness, court should look "only to *actual*" *voting patterns* rather than speculating as to the reasons" for low minority turnout)(emphasis in original).

In addition, the Eighth Circuit identified powerful reasons to believe that a cause other than dissatisfaction with African-American candidates caused African-American voter participation to decline. White voter turnout also fell and "it stands to reason that when an external stimulus dampens the white turnout it may impact even more greatly on a group that has faced

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[5](...continued)
election and all the rest boycott the election because of dissatisfaction with all candidates, the one African-American vote would determine the candidate of choice of African Americans and the boycott would be irrelevant. Petition at 21. The Eighth Circuit's holding is not so expansive. The Court of Appeals in this case found not just one vote in one election, but a pattern of "overwhelming support" for six different minority candidates. App. 7. If, as petitioners hypothesize, there had been a "boycott" or any evidence of minority dissatisfaction with these six candidates, petitioners had the opportunity to introduce such evidence into the record. The extent of the Eighth Circuit's holding is that where the defendant offers no evidence about the cause of low voter turnout, "speculation" is "inappropriate." App. 7.

historic disadvantages." App. 10. The Court of Appeals also pointed out that "in 1990 the polling place known as a historic black voter stronghold was moved to a predominantly white area ... and the 1990 election produced a record low black turnout for that particular precinct." App. 10 n.5.

II. The Court of Appeals Correctly Addressed the Issue of Proportional Representation

The Court of Appeals applied settled and unexceptional law when it concluded that proportional representation is "an important factor to consider" but that it "does not provide an absolute safe harbor." App. 11. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647, 2660 (1994) (rejecting an "inflexible rule" concerning proportional representation); *id.* at 2664 (O'Connor, J., concurring) ("proportionality ... is always relevant evidence in determining vote dilution, but is never itself dispositive"). The Eighth Circuit found: "[T]he proportional representation on which the school district relies rests on infirm grounds. The electoral success that black candidates achieved under the plurality system is no longer present. No black candidate has won a contested election since the change in the law." App. 12. As found by the Court of Appeals, proportional representation would never have been attained in the first instance had a majority vote requirement been in place prior to 1988. "Norvell Moore would have never won initially to enable him to serve multiple terms ... [and] Dr. Nunn's 1982 victory would have provided the only successful black

candidate in Blytheville history." App. 12-13.

The Petition identifies no error of law with regard to the Eighth Circuit's analysis of proportional representation. The Court of Appeals simply ruled that the results under one election system are not dispositive of the legality of a new, different election system. This ruling is consistent with this Court's teachings and with lower court precedent. The relevance of sustained proportional representation is as an indication of the "minority group's ability to elect its preferred representatives." *Gingles*, 478 U.S. at 77. Where plaintiffs show that "persistent proportional representation ... does not accurately reflect" that ability, this factor loses its probative value. *Id.*

The question in a vote dilution case is not whether the minority group has achieved proportional electoral success as a matter of *history*, but whether the system *currently* dilutes minority voting strength. "Elections held under a significantly different electorial structure ... may be less probative." *N.A.A.C.P. v. City of Niagara Falls*, 65 F.3d 1002, 1012 (2d Cir. 1995). In *Uno v. City of Holyoke*, the First Circuit explained: "The court must determine whether the challenged electoral structure deprives a racial minority of equal opportunity to participate in the political process *at present*. Though past elections may be probative of racially polarized voting, they become less so as environmental change occurs. In particular, elections that provide insights into past history are less probative than those that mirror current political reality." 72 F.3d at 990.

Here, the "environmental change" is clearly apparent. When the majority vote requirement was enacted, the Blytheville School Board had two African-American members, which constituted rough proportional representation. Under the plurality system, this rough proportionality had been maintained for a number of years. However, under the prior plurality system, only once did an African-American candidate win her first election in a head-to-head contest with a white candidate. The others were initially elected with only a plurality of the vote.

After the majority vote requirement was enacted, African Americans lost electorally-achieved proportional representation on the School Board as soon as one of the two sitting incumbents decided not to run for re-election, in 1991.[9] Representation by candidates of choice of

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[9]Petitioners' argument that white crossover voting defeats a finding of legally significant racially polarized voting also is fatally flawed in that it relies solely on pre-1988 elections. From 1988-1992, in eight different contests, no candidate-of-choice of African-American voters received sufficient white crossover votes to be elected, although a longstanding African-American incumbent was reseated unopposed. Since 1988, it has been impossible for an African-American, non-incumbent to win election to the School Board.

The dissent below points only to two elections, Helen Nunn in 1982 and Norvell Moore in 1987, in which African-American candidates of choice arguably received

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African-American voters fell from two to one. Even though six African-American, non-incumbents sought election to the School Board from 1988-1992, in eight contests, not a single one of these candidates won. Each was defeated by white bloc voting.[10] These recent elections most accurately reflect *current* political reality in Blytheville.

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[9](...continued)
a significant white crossover vote, App. 22-23. Of these, Moore, a longstanding incumbent, still won by only 23 votes. In essence, petitioners seek a ruling as a matter of law that these isolated examples compel a finding that more recent sustained losses, under a new majority vote system, by candidates overwhelmingly supported by African-American voters, cannot be attributed to white bloc voting. The petition identifies no legal error or conflict in the circuits on the Court of Appeals' treatment of crossover voting.

[10]Although a second African American was appointed to the Board in 1993, while this case was pending in the Court of Appeals, there is no evidence as to whether this person is a candidate of choice of African-American voters. The Court of Appeals correctly ruled that the appointment of a second African American was not probative of the ability of African-American voters to *elect* the candidate of their choice. App. 14 n.8.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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